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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 736

KING DAVID, *Petitioner,*

v.

ROBERT O. CLOUSER, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, King David, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above entitled case on the 4th day of October, 1962, reversing the judgment of the District Court, and holding that the latter Court erred in granting petitioner's motions for preliminary injunction and for summary judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not as yet reported —— F. 2d —— but, is appended at page 1a of the appendix.

The opinion of the District Court is unreported, but is appended herein at page 53 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered October 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(i). Time within which to file this petition was extended by this Court to and including January 10, 1963.

QUESTIONS PRESENTED

1. Is a zoning regulation discriminatory and invalid which permits doctors and dentists to maintain offices in residential neighborhoods but precludes lawyers from doing so?

2. Is there a valid exercise of the police power through zoning ordinances when a property owner is denied a variance altho the uncontroverted facts before the Board show that the restriction imposed bears no reasonable relationship to public health, safety or welfare?

3. Does an administrative board comply with the Administrative Procedure Act of 1946 (5 U.S.C., Sec. 1001-1004) when one of its members serves in a dual capacity?

STATUTES AND REGULATIONS INVOLVED

1. D.C. Code, 1961 Ed., Title 5, Sections 419 and 420.

2. Zoning Regulations of the District of Columbia, effective May 12, 1958:

Article 31, Section 3104.

The above statutes and Regulations are set out in full and appended to this petition at page 4a.

STATEMENT OF THE CASE

Petitioner, a member of the District Bar, brought his action in the United States District Court for the District of Columbia, as owner in fee simple of premises 1916 Eleventh Street, N. W., seeking to enjoin the respondents'

Board of Zoning Adjustment from the enforcement of the Zoning Regulation pendente lite, for declaratory judgment and for a mandatory injunction requiring respondents' Board to permit the use of his property for the conducting of his law offices therein.

In the District Court Judge Youngdahl granted petitioner's preliminary injunction as prayed.

Thereafter, on cross motions for summary judgment, and after hearing thereon, Judge Holtzoff, in a memorandum opinion, granted petitioner's motion for summary judgment and denied respondents' motion, and entered judgment accordingly on November 3, 1961. (Record p. 53). That thereafter the respondents prosecuted their appeal to the Court of Appeals, and after a hearing before that tribunal, the Court of Appeals reversed the judgment of the District Court. (App. p. 1a).

It is from the latter judgment that this petition is prosecuted.

Pursuant to an Act of Congress, zoning was first adopted in the District of Columbia in 1920, D.C. Code (1961) Title 5, Section 412, et seq.

That Act provided for the establishment of a Zoning Commission empowered to adopt zoning maps and promulgate zoning regulations. The Commission was authorized to fix zoning boundaries and to specify and to limit the specific uses that would locate within the fixed boundaries, but there was little flexibility permitted under this system. In order to relieve this system of the rigors and rigidities attendant therewith, Congress, in 1938, passed a new Zoning Act. Under the latter Act the Zoning Commission retained the powers previously vested in it. The new Act, Title 5, Section 420, D. C. Code, created a Board of Zoning Adjustment, which the Commission could empower to make specific exceptions to the provisions of the Zoning Regulations, pursuant to appropriate principles, standards,

rules, conditions and safeguards as set forth in the Regulations, and to hear and decide requests for special exception or variances in accordance with the provisions of the Zoning Regulations. A special exception is part of the zoning plan and the instant petition presents a special exception or variance. The respondents' Board denied petitioner's request for a special variance to utilize his property as a residence and law offices.

At the hearing before the respondents' Board the undisputed evidence disclosed that prior to May 12, 1958, the area in question was zoned first commercial, and thereafter the area was rezoned "R-4" or Residential-4.

That petitioner purchased the locus in question in the year of 1960, that at the time of his acquisition of the locus the said property was used as a rooming house wherein wine drinkers and people of questionable characters annoyed the neighborhood. That the building was without water, gas, heat and other utilities. That petitioner installed these utilities and removed three truckloads of debris from the premises. That petitioner renovated the premises and constructed his law offices on the first floor at a cost of Four Thousand ($4,000.00) Dollars. (R. p. 29). Also at the hearing before the said Board it was shown that in the area of the 1800 and 1900 blocks of Eleventh Street, N. W., businesses of various kinds were being conducted, a newspaper office, plumbing company, law office, three (3) beauty parlors, business promotion office, florist shop, physician's office, and parking lot. (R. p. 26).

That in the 1900 block there are, gasoline station, physician's, dentist's and attorney's offices, real estate offices, apartment buildings, and office buildings together, with a parking lot.

Mrs. Armond W. Scott, who resides at 1922 Eleventh Street, N. W., testified that: "Personally, I would prefer that there would be an office there instead of the type we

had before. With a business office you don't have a lot of children hanging around disturbing the neighborhood." (R. p. 28).

Myron Johnson, who resides at 1834 Eleventh Street, N. W., and operates a beauty parlor at 1836 Eleventh Street, N. W., testified that prior to the ownership and offices of petitioner, premises 1916 Eleventh Street, N. W., was occupied by most undesirable tenants, who molested her customers as they passed in transit to her beauty parlor. (R. p. 36).

Paul Kelly, who operates a real estate office and business at 1914 Eleventh Street, N. W., adjoining petitioner's property, testified that the improvements made by petitioner to the property, and the installation of his law offices, constitute a benefit to the area and increased the value of the the property in the area. (R. p. 30).

Henry Petty, a building contractor, testified that at the time of acquisition by petitioner, the property was in such delapidated condition that he refused the contract to renovate the building. Mr. Petty said, "No, Sir, I wouldn't touch the job. The walls were torn down, heat was gone. It was completely demolished inside." (R. p. 36).

Dorothy R. Renny, 1921 Eleventh Street, N. W., testified that the teenagers and adults who lived at 1916 Eleventh Street, N. W., prior to the purchase by petitioner, made so much noise you couldn't sleep at nights. She said, "Several times I called the police with the disturbance there. Since Mr. David has bought the property he fixed it up and it has been quite a credit to the neighborhood and most of the people that live in this neighborhood all of them want this." (R. p. 29).

Mr. Barry K. Walton, 1910 Eleventh Street, N. W., testified that he has lived at his address for forty (40) years, that the petitioner's purchase and improvement of the property is a credit to the neighborhood. (R. p. 25).

No testimony whatever was introduced in opposition to the application. No property owner, no resident, no business man of the area interposed any objection.

Moreover, the property in question is within a half block of "You Street, N. W.," a business street.

REASONS FOR GRANTING THE WRIT

I.

"There Was No Rational Basis for the Decision of the Board"

The amended complaint of the petitioner alleged fully the grievances with which he was met by the decision of the respondents' Board. (R. p. 12). The ruling of the Board was that, if the premises could be used for the zoned purpose, practical difficulties and unnecessary hardship did not exist, in the context of the variance statute so, that petitioner was not entitled to a variance and that petitioner should desist in his use of the premises as law offices irrespective of the neighborhood's welfare.

While, with respect to judicial review of the Board of Zoning Adjustment action, Courts are not warranted in substituting their judgments for those of such Boards, it is nevertheless well established that the governmental power to interfere by zoning regulations with the general rights of the land owner, or restricting the character of his use, is not unlimited and the determination of the question is a duty which the Court must discharge. This Court has said that: "Such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare." *Nectow* v. *Cambridge*, 277 U.S. 183, 188.

It is apparent therefore that everyone upon whom any organ of government acts has a right to have that agency make its decision upon evidence, which is open to question and cross-examination. If there be facts within the expert knowledge of the members of the Board, or acquired by

personal inspection of the premises, these (should have been) revealed at the hearing so that opportunity may have been afforded to have met them by evidence or by argument.

The very existence of variance regulations recognized the absolute necessity to avoid the working of grave hardship upon property owners, which would draw into question the validity of the Regulations themselves, by the allowance of exceptions from its rigors within an established area.

A zoning board of appeals acts in a quasi-judicial capacity. And its decisions are reacehd only after the presentation of evidence deemed to warrant such action. *Burr* v. *Rago*, 120 Conn. 287, 180 A. 444, 446; *Coleman* v. *The Board of Appeals*, 281 Mass. 112, 183 N.E. 166. An exception in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance, as those upon which an exception may be permitted, are found to exist. *Application of Deverent Foundation, Inc.*, 351 Pa. 478, 41 A. 2d 744, appeal dismissed, 326 U.S. 686.

The evidence adduced at the hearing before Board showed conclusively that the use to which petitioner's building was put not only enhanced the value of the area property, but, was most beneficial to the neighborhood. All of the witnesses favored the granting of variance requested by petitioner. All of the witnesses expressed gratification for the elimination of the undesirable tenants who occupied the premises while in use as a rooming house prior to petitioner's acquisition.

The District Court, in a memorandum opinion by Judge Holtzoff, found the action of the Board to be arbitrary and capricious, and without a rational basis for its decision. The District Court further found that the neighborhood is a deteriorated one. That many of the properties located in the two blocks comprising the area, have been employed for a long time and are now utilized for non-conforming commercial uses. The Court pointed out some of

the uses such as beauty shops, plumbing shop, gasoline station, "as well as others." The others include newspaper office, law office building, real estate offices, physician-dentist's offices, parking lot, restaurant, grocery store, and public accountant office. The District Court further found that these businesses would continue for a long time in the area and that the maintenance of law offices at 1910 Eleventh Street, N. W., would not adversely effect the neighborhood, but, on the contrary would improve the neighborhood, inasmuch as the prior use of the property was that of rooming house whose occupants were of questionable characters. The District Court's judgment further questioned the reasonableness of the action of Board which grants variance to doctors and dentists in the neighborhood and denies such variance to lawyers. (R. p. 53).

The opinion of the Board (R. p. 45), failed to recite the testimony given at the hearing before it, the opinion merely recited excerpts from Title 5, Section 420 (3) of the D. C. Code, 1961 edition. The opinion assumes in the absence of affirmative evidence, that, "the area is predominently developed with dwellings . . ." The District Court found that this was, "a degenerated one," and the permission of non-conforming commercial uses now in operation was not in furtherance of residential purposes. Indeed, many of these non-conforming commercial uses are permitted under Title 5, Section 419 of the said Code, while others operate under variance granted by the respondents' Board.

The opinion of respondents' Board further found that a variance could not be granted petitioner: "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan, etc." This finding is supported by no evidence whatever and has no rational basis. The opinion and judgment of the District Court analyzed the foregoing findings of respondents' Board and found the conclusion to be inescapable that the decision of respondents' Board was

not sustained by substantial evidence, and by so much was deemed arbitrary and capricious, in a legal sense, and had to be set aside.

The decisions of the Court of Appeals reversing the judgment of the District Court, makes no attempt to discuss the evidence. The decision does not analyze the area or neighborhood in order to determine what, if any, bearing the zoning restrictions have upon the public health welfare and safety.

In essence the Board, interpreting its regulations, in which ruling the appellate Court below abides, holds the regulation safe from judicial censure, if no relief from its rigors is spelled out, and the property can possibly be used for a permitted purpose, regardless of the circumstances. This is inherently oppressive and can only be justified if the restriction bears a substantial relation to the public welfare, health and safety. Similar restrictions have been universally held to be unconstitutional as unreasonable. *People ex rel. Larson* v. *City of Chicago*, 179 N.E. 2nd 676, 24 Ill. 2nd 15; *Robertson* v. *City of Salem*, 191 Fed. Supp. 604. The public good cannot be served by imposing a restriction on the use of the property here involved contrary to the trend of development presently evidenced and reasonably probable.

II.

The Zoning Regulations as Applied to Petitioner's Property Violates the Fifth Amendment to the Federal Constitution

To justify the treatment of one person's property differently than another's, the classification must be made in reference to factors clearly related to health, safety and welfare. In petitioner's statement of the case, the several non-conforming commercial use properties are detailed. The amended complaint of petitioner (R. p. 12), alleges inter alia that the area prior to May 12, 1958, was zoned commercially, that a portion of the 1900 block of Eleventh

Street, N. W., is still zoned commercial, and in that block there are ten (10) commercial establishments. It is further alleged in the amended complaint that: "on or about June 1, 1961, premises 1930 Eleventh Street, N. W. was issued an occupancy permit allowing said premises to be used as a dentist office and other professional offices."

This Court speaking on the issue of discriminatory application of zoning ordinances in the case of *Dobbins* v. *Los Angeles*, 195 U.S. 223, at page 241, said, "But where the facts as to the situation and condition are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the court may consider and give weight to such purpose in considering the validity of the ordinance. This Court, in the case of *Yick Wo* v. *Hopkins*, 118 U.S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts." The granting of occupancy permit to dentists and physicians at 1930 Eleventh Street, N. W., in 1961 and denying similar variance to petitioner at 1916 Eleventh Street, N. W., thereafter is a discrimination condemned by this Court.

Where it appears that several properties are in identical categories, the burden rests upon the municipality to justify a different treatment. There must be a clear, real and substantial connection between the assumed distinction and the health, safety, morals and general welfare. *Brown* v. *City of Seattle*, 272 P. 517, 150 Wash. 293; *City of Austin* v. *Nelson*, 45 S.W. 2d 692 (Tex.).

Where Section 3104 of the D. C. Zoning Regulations establishes "R-4" residential zoning, and permits as a matter of right the following uses: dwellings, flats, apartment houses, private schools, rooming houses, boarding houses, hospitals, sanitariums, clinics for humans, conva-

lescent or nursing homes, private clubs, lodges, fraternity houses and sorority houses, and in the area of the locus of petitioner's property and the respondents' Board denies to petitioner the use of his property for law offices, such denial is discriminatory "per se."

Moreover, in augmentation of the foregoing the record shows that premises 1930 Eleventh Street, N. W., is used for the operation of offices for dentists, physicians and other business. That such uses were granted in June of 1961. That aside from these there are ten (10) other business establishments in the 1900 block of Eleventh Street, N. W., by virtue of the provision of Title 5, Section 419 of the said D. C. Code. At 1908 Eleventh Street, N. W., the offices of a lawyer and a physician are contained therein.

This Court has held that the application of a zoning regulation so as to discriminate against a property owner in the zoned area denied to such owner due process of law. *Nectow* v. *Cambridge*, 277 U.S. 183. This view has been followed by the trend of states decision. *Spies* v. *Board of Appeals*, 337 Ill. 507, 169 N.E. 220; *North Muskegon* v. *Miller*, 249 Mich. 52, 227 N.W. 743, and *Condts* v. *Hutton Co.*, 262 N.Y.S. 539. Zoning ordinances must be uniform and equal in operation and effect, and provide those in similar circumstances, among whom no reasonable basis for distinction exists, as is constitutionally required. *Women's etc., Society* v. *Kansas City*, 8 Cir., 58 F. 2d 593.

The regulation here, to achieve constitutional invulnerability, must assert that the conduct of a medical or dental office serves, but a similar use of the property for a law office offends the public safety, welfare or health. Since in the present circumstances no evidence was adduced to found such a distinction the restriction would be arbitrary and capricious, in a legal sense, unless it can be said that such use of the property were somehow inherently and necessarily injurious to the public safety, health and welfare. However, critical one may be of this profession or

how severe and prejudiced the view no precedent obtains for such a discrimination nor is such a conclusion arguably axiomatic. To validate such a regulation, in its present application, is to judicially constitute the lawyer as a species of community pariah.

It was therefore an unjust discrimination against the petitioner to deny him the use of the locus for the operation of his law offices.

III.

The Zoning Regulations in Question Were Administered By Respondents' Board in a Manner to Reduce the Nominal Value of Petitioner's Property and to Deprive Him of Liberty and Property Without Due Process of Law

The underlying purposes which gave rise to the creation of the zoning laws in the District of Columbia are expressed in Title 5, Section 412, D. C. Code, 1961, as follows: "To protect the public health, secure the public safety and to protect property . . ."

The Northerly portion of the area in question intersects U Street at Eleventh Street, N. W. The increasing business growth on U Street, N. W., from Ninth Street, N. W., to 18th Street, N. W., has caused extensive business overflowing into the adjacent blocks such as the 1900 block of Eleventh Street, N. W., the locus of petitioner's property. It is obvious of course, that this business expansion will soon absorb the adjacent areas, including the area of the locus.

It is in restraint of this fact and prospect that respondents' Board denied petitioner the variance sought by him. This denial in effect erects a dam around petitioner's property, to hold back the flood of commercial expansions seeking location in the vicinity of U Street. This the respondents' Board implies is necessary in order to preserve a residential character in the area. The area which respondents' Board seeks to protect as residential is one

which the Zoning Regulation, Section 3104 has made ten (10) modifications as of right of a non-residential character and seven (7) other uses upon approval of respondent Board. The respondents argued below, and, the Court of Appeals seemingly chided petitioner for the conversion of the locus into law offices use without first having secured a variance for such purpose. However, the wrong merely had its birth at the time of the adoption of Regulation 3104, but was aggravated when respondent Board denied him the variance sought. To require petitioner to wait for the granting of a variance before putting his property to use as a law office, is to concede the constitutional validity of a zoning regulation which is discriminatory on its face. Where ten (10) business establishments operate in the block of the locus and another recently, had been granted a permit at 1930 Eleventh Street, N. W., it is unreaonable to restrain the petitioner from the enjoyment of his liberty and property without due process of law.

In the case of *Attorney General* v. *Inhabitants of Town of Dover*, 327 Mass. 601, 100 N.E. 2d 1, the zoning ordinance was similar to the instant Section 3104. There the ordinance was residential, including detached one-family dwellings, church, educational use of non-sectarian and if not organized or operated for profit. The challenge was made against the ordinance because it discriminated against sectarian education. The Court declared the offensive ordinance unconstitutional.

Where localities and circumstances are similar, zoning ordinances must not operate more repressively against some than other property and use, or, conversely stated, they must not arbitrarily favor one more than another land, structure or use. See, 8 McQuillin Municipal Corporation (3rd Ed.) 134, Sec. 25.61. This principle was recently illustrated in the case of *Commerce Oil Refining Co.* v. *Miner*, 1 Cir., 281 F. 2d 465.

This Court discussing discrimination in zoning regulations and discriminatory applications thereof said in the case of *Seattle Trust Co.* v. *Roberge*, 278 U.S. 116, that: Zoning measures must find their justification in the police power exerted in the interest of the public . . . the right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution.

The very fact that provisions are made for non-conforming use in Title 5, Section 419 of the D. C. Code, is an admission that all uses of buildings or land do not agree with the regulation of the use area. In the infancy of zoning there was the tendency to view provision for variances as authorization of unconstitutional deviation, but such tendencies have disappeared with the emergence of zoning measures dependent upon a rule or standard of law to govern the discretion of zoning boards. *Bradley* v. *Board of Zoning Adjustment*, 255 Mass. 160, 150 N.E. 892.

The standard state zoning enabling act to meet the great demand for municipal zoning legislation was prepared by an advisory committee appointed by Herbert Hoover when he was Secretary of Commerce. It provided in effect that the municipal legislative body may divide the municipality into use districts lest suited to carry out the purposes of the act and establish use regulations and restrictions in each district or class of districts. It also states the proper purposes and considerations to govern municipal zoning. The standard act is a general delegation of power to city to regulate and control the use of property in zoning districts established by ordinances. That is, these zoning laws must comply with the necessary standards, viz., "definiteness and certainty, reasonableness, uniformity of operation and freedom from discrimination." 8 McQuillin, Municipal Corporation (3rd Ed.), P. 123, Sec. 25.57. Cf. *City of Derby* v. *Hiegert*, 1958, 183 Kans. 68, 325 P. 2d 35. Where the Court in an explication of the principles said, *inter alia*:

> "We have stated that a distinction imposed by an ordinance, to be valid must be reasonable and must rest upon some ground of difference fairly related to the object of the legislation. It is apparent that the ordinance involved herein creates an unlawful classification, discriminatory in nature, which renders the ordinance invalid. Section 3 provides that the ordinance shall not apply to religious, charitable or community service organizations. There is no reasonable ground upon which the classification can be made."

In the light of the foregoing, it is manifest that not only was the operation of Section 5-520 of the D. C. Code discriminatory, as applied to petitioner, but that Section 3104 of the D. C. Zoning Regulation was discriminatory in its provisions.

IV.

Was It a Violation of the Administrative Procedure Act of 1946 for a Member of Respondents' Board to Serve in a Dual Capacity?

Paragraph 16 of petitioner's amended complaint (R. p. 12), alleges and the record shows that respondent, Robert Clouser, who sat as a member of the Board of Zoning Adjustment, in the instant case, also serves as Director of Planning for the Zoning Commission. Thus, Mr. Clouser, in his dual capacity, sat in judgment on Zoning Regulations which he himself has promulgated.

This Court has held that administrative agent may not function in dual capacity in violation of the Administrative Procedure Act of 1946, 5 U.S.C., Sec. 1001-1004, et seq.

This principle was well illustrated by this Court in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 94 L. Ed. 616.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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